

United States of America,
Plaintiff,
vs.
(1) Kevin Joseph Fenner,
Defendant.

)
) File No. CR-06-211
) (MJD/AJB)
)
)
) Minneapolis, Minnesota
) December 9, 2008
) 9:55 a.m.
)
)
)

(SENTENCING)

For the Plaintiff: U.S. Attorney's Office
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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Let's call this matter.

THE CLERK: United States of America vs. Kevin Joseph Fenner, Criminal Case No. 06-CR-211. Counsel, will you please state your appearances for the record.

MR. PAULSEN: Good morning. Jeff Paulsen for the United States.

THE COURT: Good morning.

MR. ORTH: Good morning, Your Honor. Bill Orth representing Mr. Fenner, who is present.

THE COURT: Good morning. We are here for sentencing. Counsel, have you had an opportunity to read the presentence investigation report?

MR. PAULSEN: The Government has, Your Honor.

MR. ORTH: Yes, Your Honor.

THE COURT: Any objections to the factual statements contained in the presentence investigation report?

MR. PAULSEN: Not to the facts.

MR. ORTH: Nothing other than what has already been filed, Your Honor.

THE COURT: The Court will adopt the factual statements contained in the presentence investigation report as its own.

1 The applicable guidelines have been calculated.
2 The Government wished to have a two-level enhancement for --
3 against the defendant because in their view under 3C1.1 the
4 defendant perjured himself. The Court has reviewed -- heard
5 the testimony and reviewed the submissions, and the Court
6 will deny the Government's motion for obstruction based on
7 giving perjured testimony at trial.

8 Therefore, the total offense level is 37, criminal
9 history points of 14, Category VI, imprisonment range life
10 imprisonment, supervised release eight years, fine range of
11 25,000 to 20 million dollars, and a special assessment of
12 \$400.

13 There has been many continuances on this matter,
14 many briefs have been filed, so we don't have to spend hours
15 arguing this case.

16 Mr. Orth.

17 MR. ORTH: I don't have the energy to spend hours,
18 Your Honor. I've left it all in my briefs.

19 In 1954 nine justices of the United States Supreme
20 Court did the right thing. They took on the concept of
21 separate but equal that has stood for about a hundred years
22 and they said it's just wrong. I'm asking you to do the
23 same thing relative to the crack statute. It is just wrong
24 to continue this folly that because Congress made a mistake
25 20 years ago we have to keep repeating it.

1 And that's why in my motion papers I mentioned to
2 you that not just the Vice President of the United States,
3 but the President of the United States signed off on the
4 change. Now, it may be a while because they've got the
5 economy to deal with first rather than criminal justice, but
6 I'm suggesting to you, Your Honor, it's just a matter of
7 time.

8 And just as the United States Supreme Court
9 stepped up, nine of them, in separate but equal, in Brown
10 vs. the Board, I'm asking you proleptically to do the same
11 thing for what Congress is going to do either next year or
12 2010.

13 I suggested to you a sentence of 30 years in
14 prison. That is not exactly being light on crime, soft on
15 crime. And I chose that number, as I told Mr. Paulsen,
16 because I think even the Eighth Circuit, that I have running
17 battles with all the time, even the Eighth Circuit given the
18 current posture of Congress, even the Eighth Circuit might
19 affirm a ruling from this Court that 841(b)(1)(A)(3) is
20 unconstitutional both for the Fifth Amendment reasons and
21 the Eighth Amendment reasons that I've briefed.

22 It looks like Congress and the new administration
23 is going to do it either next year or soon thereafter. I
24 think the Eighth Circuit would be hard pressed under these
25 circumstances to reverse you.

1 And even if the Eighth Circuit did reverse you,
2 we're not through. We're going to go to the United States
3 Supreme Court, which has continuously told the Eighth
4 Circuit that its view of sentencing is wrong. And then if
5 that doesn't work, we're going to come back in front of you
6 on a 2255.

7 Mr. Fenner is not going to die in prison and I
8 don't know how I'm going to get there, but we're going to
9 find a way because it's just wrong. The basis of law is
10 morality and ethics, and this statute can no longer be
11 tolerated.

12 I brought with me the audacity of hope. One of
13 the agents, not the agents that are present here today, but
14 one of the agents asked me last summer, Why are you fighting
15 so hard? Why don't you just let the man go to prison? I
16 said, Because as long as you have hope, you have everything.

17 And if you basically send him to prison for the
18 rest of his life, that's a death sentence. He'll die in
19 prison with tubes in a prison infirmary somewhere, all
20 because Congress made a mistake 20 years ago.

21 The audacity of hope should be called the
22 necessity of hope. Hope is the last gift in Pandora's box.
23 And when you remove hope from somebody, you've removed
24 everything.

25 I've suggested to you a 30-year sentence. That's

1 a harsh sentence. That's tremendous punishment. I don't
2 know who would want to have that kind of sentence imposed
3 upon them for any reason. This is drugs. This is not
4 homicide. I think it's a fair sentence and I think even the
5 Eighth Circuit might affirm you. So I ask you to impose
6 that sentence and in one fashion or another we'll be back in
7 front of you.

8 Thank you.

9 THE COURT: Kevin Joseph Fenner, this is your
10 opportunity to speak to me. You have a constitutional right
11 to talk to me and tell me anything that you want to tell me
12 about yourself, about this offense, or anything else that
13 you think I should know before I sentence you.

14 THE DEFENDANT: First can I turn to my family for
15 just a minute to speak to them for a second, please?

16 THE COURT: You can turn to them.

17 (Defendant turns away from podium and speaks inaudibly
18 to his family.)

19 * * * * *

20 (Defendant turns back to podium and addresses the
21 Court.)

22 THE DEFENDANT: Your Honor, I have not lied to you
23 or these courts not one time, not one time. In fact, I even
24 admitted my guilt on the stand. You asked me why did I go
25 to trial back on June 22nd. Because I believed in this law

1 system.

2 I knew I was wrong and I knew I was going to get
3 punished for what I done. That's without a doubt. I just
4 didn't have nothing to do with no damn crack, man, and I
5 admitted to that and I even told Paulsen himself.

6 Let's go back. Like I said, I have not lied to
7 you or this Court not one time, not once. However,
8 Mr. Paulsen and the case agent told the grand jury that I
9 had 80 grams of crack on me. They indicted me for 80 grams
10 of crack and it turned out to be 35.9 grams of actual
11 powder. They told the grand jury that I possessed
12 100 percent fentanyl, which that turned out to be 3.6
13 percent fentanyl, which is only three-tenths of a gram.

14 They told the jury, Mr. Paulsen told the jury that
15 powder and crack was basically the same, so if you sentence
16 me for one, you can sentence me for the other, and told the
17 jury that if I give somebody three ounces of powder, they
18 can convict me for crack cocaine.

19 I went to trial because I wanted to get punished
20 for my participation, what I did, not for nobody else's. I
21 didn't make a dime off that damn crack, not one penny. I
22 didn't know he was selling no damn crack. I possessed
23 powder cocaine and I possessed fentanyl, yes, I did.

24 But to get the conviction and to get the most time
25 and to take me off these streets so I won't produce, so I

1 won't be no father, Your Honor -- man, I can't take this.
2 Go ahead. Go ahead.

3 THE COURT: Go ahead.

4 THE DEFENDANT: I can't take it, man. Just
5 sentence me, man. I can't take this. I don't want my
6 child to -- just sentence me.

7 THE COURT: Mr. Paulsen.

8 MR. PAULSEN: The statute calls for mandatory life
9 and the guidelines call for 360 to life because he's a
10 career offender with five prior felony drug convictions.
11 This case is one of the rare cases that calls for life
12 whether it's under the guidelines or under the mandatory
13 minimum, and I don't say that lightly.

14 I appreciate the statement Mr. Fenner just made to
15 his child and I hope the child listens because I don't want
16 to see anybody else waste their life the way Mr. Fenner has
17 done.

18 But the reason this calls for a life sentence is
19 not just because he's got five prior drug convictions that
20 haven't deterred him, but because he was selling fentanyl
21 and it was starting to kill people. And it says so right so
22 in the PSR and there's no objection to those facts. His
23 fentanyl was killing people and he kept selling it.

24 And these officers went out and made a case on him
25 and he was caught and he knew he was caught. And we went to

1 him and we asked him for help. You're looking at mandatory
2 life. I've just enhanced you to mandatory life. Help us
3 get your source down in Chicago so we can get this guy off
4 the streets so he doesn't kill tens or dozens of people with
5 his fentanyl down in Chicago.

6 We thought we had a deal. We came before the
7 court one day, almost entered the plea, and he backed out
8 and said I don't want to help you. Now, he doesn't have to
9 help us. That enhancement was filed before we even sat down
10 with him. That was the starting point. He was given the
11 chance to work down and he chose not to. He chose to go to
12 trial and try to beat it, and in my view he told some
13 falsehoods.

14 It is a sad case, but it is a case of his making.
15 And he can try to blame the police or me or the Court or the
16 judicial system, but down deep I think he knows that
17 everything is his fault. It's the life he chose, and it's
18 sad and it's unfortunate and I hope nobody in this courtroom
19 would ever think to follow it, but that's the reason I'm
20 asking for a life sentence.

21 THE COURT: On January 11, 2007 the defendant was
22 found guilty of Counts 1, 2, 3, and 7 of a nine-count
23 amended indictment following a jury trial.

24 Count 1, conspiracy to distribute fentanyl and in
25 excess of 50 grams of cocaine base, in violation of

1 Title 21, United States Code, Section 841(a)(1) and
2 (b)(1)(A) and 846 and 851.

3 Count 2, aiding and abetting distribution of
4 approximately 63 grams of cocaine base, in violation of
5 Title 21, United States Code, Section 841(a)(1) and
6 (b)(1)(A) and 851, and Title 18, United States Code,
7 Section 2.

8 Count 3, aiding and abetting distribution of
9 approximately eight grams of fentanyl, in violation of
10 Title 21, United States Code, Sections 841(a)(1) and
11 (b)(1)(C) and 851, and Title 18, United States Code,
12 Section 2.

13 Count 7, possession with intent to distribute
14 approximately 63 grams of cocaine, in violation of Title 21,
15 United States Code, Section 841(a)(1) and (b)(1)(C) and 851.

16 To these counts of the indictment he was found
17 guilty by a jury and it is considered and adjudged that the
18 defendant is guilty of said charges.

19 The Court has gone over the advisory guideline
20 sentence. The sentence will be as follows:

21 Kevin Joseph Fenner, you are sentenced to the care
22 and custody of the Bureau of Prisons for a term of life.
23 This term consists of life on each of Counts 1 and 2 and 360
24 months on each of Counts 3 and 7, all to be served
25 concurrently.

1 The Court will not impose a fine.

2 The defendant is sentenced to a term of eight
3 years supervised release. This term consists of eight years
4 on each of Counts 1 and 2 and six years on each of Counts 3
5 and 7, all such terms to run concurrently. The following
6 conditions are also imposed:

7 One, the defendant shall not commit any crimes,
8 federal, state, or local.

9 Two, the defendant shall abide by the standard
10 conditions of supervised release recommended by the
11 Sentencing Commission.

12 Three, the defendant shall refrain from possessing
13 a firearm, destructive device, or other dangerous weapon.

14 Four, the defendant shall be required to undergo
15 mandatory drug testing as set forth by Title 18, United
16 States Code, Sections 3563(a) and 3583(d).

17 Next, the defendant shall participate in a program
18 for drug abuse as approved by the probation officer. That
19 program may include testing and inpatient or outpatient
20 treatment, counseling, or support group. Further, the
21 defendant shall contribute to the costs of such treatment as
22 determined by the Probation Office Co-Payment Program, not
23 to exceed the total cost of treatment.

24 Next, the defendant shall cooperate in the
25 collection of DNA as approved by the probation officer and

1 mandated pursuant to Title 18, United States Code,
2 Sections 3563(a) and 3583(d).

3 Next, the defendant shall comply with the District
4 of Minnesota Offender Employment Policy, which may include
5 participation in training, counseling, and/or daily job
6 searching, as directed by the probation officer. If not in
7 compliance with the condition of supervision requiring
8 full-time employment at a lawful occupation, the defendant
9 may be required to perform up to 20 hours of community
10 service per week until employed, as approved and directed by
11 the probation officer.

12 Finally, there's a \$400 special assessment payable
13 to the Crime Victims Fund, which is required by statute to
14 be paid immediately.

15 Sir, you have a right to appeal your trial and
16 your sentence to the Eighth Circuit Court of Appeals, which
17 sits in St. Louis. The notice of appeal has to be filed
18 within ten days of today's date. Mr. Orth will be your
19 attorney on your appeal unless you want to handle the appeal
20 yourself or hire your own attorney.

21 The fine range is 20,000 to 20 million dollars
22 instead of 25,000, as I stated earlier, dealing with the
23 advisory guidelines.

24 Let's go back to the appeal rights and make sure
25 that you understand your appeal rights. You have a right to

1 appeal your right -- your sentence and your trial to the
2 Eighth Circuit Court of Appeals, which sits in St. Louis.
3 You have ten days from today's date to file your notice of
4 appeal to that court.

5 Mr. Orth will immediately file that appeal for
6 you. I am ordering him to do that because this is a life
7 sentence. I don't want any slip-ups on your appeal. You
8 have a right to appeal and I want you to appeal because it's
9 a life sentence.

10 Mr. Orth will handle your appeal unless you don't
11 want him to handle the appeal. Then you can handle it
12 yourself or hire your own attorney to handle the appeal. In
13 any event, you have ten days from today's date to file your
14 notice of appeal and I am ordering Mr. Orth to file that
15 immediately.

16 Now, I've been a judge for 25 years. I've had
17 multiple homicides where defendants have killed two or three
18 or four people and have not received a life sentence, and
19 that's in state court. I came to federal court 15 years
20 ago. The sentences were quite high for drugs and especially
21 for crack cocaine. Mr. Orth has articulated the problems
22 with the law.

23 But rest assured, Mr. Fenner, you would have
24 served a long, long sentence even if the equation was the
25 same. You chose the life of the street. You have numerous

1 convictions which put you in this category. Certainly
2 having the drug of fentanyl on the street where people were
3 dying, you chose not to give up your source in Chicago,
4 which is your right. By doing that you sealed your fate and
5 that's life in prison.

6 Anything further for the Government?

7 MR. PAULSEN: No, Your Honor.

8 THE COURT: For Defense?

9 MR. ORTH: Yes, Your Honor, two things. Would you
10 recommend that the Bureau of Prisons designate Mr. Fenner to
11 Minnesota?

12 THE COURT: I will recommend to the Bureau of
13 Prisons that he be housed in the state of Minnesota, but
14 more than likely he will not be housed here.

15 MR. ORTH: And the last thing. Is it possible
16 for -- under the supervision of the Marshals that Mr. Fenner
17 can say good-bye to his wife and son?

18 THE COURT: He'll sit at the back chair. They are
19 not to move. We have enough deputies in the courtroom. He
20 can talk to them for a few minutes.

21 THE DEFENDANT: Can I just hold my son one time?

22 THE COURT: No. No contact. Do you want to
23 comply with my conditions --

24 THE DEFENDANT: Yes.

25 THE COURT: -- or not?

1 THE DEFENDANT: Yes.

2 THE COURT: You'll sit for five minutes and talk
3 to your family.

4 Anything further?

5 MR. PAULSEN: No, Your Honor.

6 THE COURT: All right.

7 (Court adjourned at 10:20 a.m.)

8 * * *

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11 I, Lori A. Simpson, certify that the foregoing is a
12 correct transcript from the record of proceedings in the
13 above-entitled matter.

14

15 Certified by: s/ Lori A. Simpson

16 Lori A. Simpson, RMR-CRR

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